

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2012-2136
Plaintiff-Appellee,	:	On Appeal from the Summit County
vs.	:	Court of Appeals, Ninth Appellate
LUCIOUS TAYLOR,	:	District
	:	Court of Appeals Case No. CA-26279
Defendant-Appellant.	:	

**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT LAWRENCE A. DIBBLE**

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STATEMENT OF THE CASE AND OF THE FACTS

Lucious Taylor was indicted in Summit County for theft, a violation of R.C. 2913.02(A)(1) and, at the time, a felony of the fifth degree. *State v. Taylor*, 9th Dist. No. 26279, 2012-Ohio-5403, 2012 Ohio App. LEXIS 4689, ¶ 2. The charge stemmed from his theft of property worth \$550.00. *Id.* Mr. Taylor plead no contest to the theft charge. *Id.*

Between the plea hearing and the sentencing hearing, however, the recently-enacted 2011 Amended Substitute House Bill 86 went into effect, which changed the dollar amounts that defined the offense levels for theft. *Id.* Specifically, House Bill 86 made the following changes to R.C. 2913.02(B)(2):

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is ~~five hundred~~ one thousand dollars or more and is less than ~~five~~ seven thousand five hundred dollars * *

* a violation of this section is theft, a felony of the fifth degree.

2011 Am.Sub.H.B. No. 86 (amendment to R.C. 2913.02).

In accordance with HB 86, at Mr. Taylor's sentencing hearing, the court found him guilty of a misdemeanor of the first degree. *State v. Taylor*, CR-2011-07-2033, December 27, 2011 Sentencing Entry. Mr. Taylor was sentenced to 120 days in jail, suspended pending the completion of two years of community control. *Id.*

The State appealed the trial court's determination that Mr. Taylor was guilty of a misdemeanor, and on November 21, 2012, the Ninth District Court of Appeals partially reversed Mr. Taylor's sentence. *Taylor* at ¶ 1. The appellate court held that Mr. Taylor's should have been found guilty of a felony of the fifth degree, but his sentence should remain the sentence for a misdemeanor of the first degree. *Id.* at ¶ 9.

Shortly after its decision, the Ninth District Court of Appeals certified a conflict between its decision in *Taylor* and the Fifth District Court of Appeals' decision in *State v. Gillespie*, 975 N.E.2d 492, 2012-Ohio-3485 (5th Dist.) and *State v. David*, 5th Dist. No. 11-CA-110, 2012-Ohio-3984. *State v. Taylor*, CR-2011-07-2033, December 17, 2012 Journal Entry. On February 20, 2013, this Court determined that a conflict existed. *State v. Taylor*, 134 Ohio St.3d 1466, 2013-Ohio-553, 983 N.E.2d 366. This Court agreed to hear this case on the following issue:

“[W]hether ‘defendant [may] benefit from a decrease in a classification and penalty of an offense by the General Assembly [that becomes effective] between the time that the defendant committed the offense and the time of his sentencing on that offense [.]’”

Id.

**STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The OPD focuses primarily on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research within the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court may decide how statutory amendments are applied to Ohio's defendants. The legality of a number of Ohio felony convictions could be determined as a result of this Court's decision of this case. OPD urges this court to recognize the role of Ohio's legislature in defining offense levels and the proper application of R.C. 1.58(B) to criminal defendants.

ARGUMENT

PROPOSITION OF LAW

A defendant is entitled to a decrease in a classification and penalty of an offense when the general assembly amends the classification and penalty for that offense that becomes effective between the time that the defendant committed the offense and the time of his sentencing on that offense.

Ohio Revised Code Section 1.58(B) requires a sentencing court to give a defendant the benefit of any changes made to the Revised Code that take effect before that defendant is sentenced. This has always included changing the offense level of a theft in accordance with changes to the dollar amounts that define those levels. But, the appellate court here denied Mr. Taylor the benefit of the lower misdemeanor offense level, disregarding the requirements of Ohio's Revised Code. This Court should reverse the appellate court to give effect to the intent of the legislature and apply the plain meaning of R.C. 1.58(B).

I. Amended dollar amounts for theft offense levels: amount drives degree, and degree drives penalty.

Historically, for theft offenses, dollar amounts have been used to determine theft-offense degrees. Those offense degrees, in turn, have specific penalties that attach once the defendant has been convicted. As the amount at issue increases, the offense is more severe, and the General Assembly attaches higher penalties to higher dollar amounts in order to more harshly punish the most severe offenses. In short, the offense level reflects the severity of punishment that the General Assembly has authorized for a given theft offense.

When the theft statute was previously amended, Ohio's courts addressed the application of R.C. 1.58(B) to defendants like Mr. Taylor. The 3rd District Court of Appeals held that R.C. 1.58(B) required lowering the offense level as well as lowering the penalty. *State v. Collier*, 22

Ohio App.3d 25, 488 N.E.2d 887 (3d Dist. 1984). The 10th District Court of Appeals held the same in *State v. Burton*, 11 Ohio App.3d 261, 464 N.E.2d 186 (10th Dist. 1983).

The *Collier* court explained how and why dollar amount drives degree, and therefore determines the applicable penalties, in theft offenses. That court explained that the amount of property involved in a theft offense “only serves to define the degree of the offense and to prescribe the penalty for that degree. * * * These degrees do not describe different offenses but merely provide a means to enable the court to administer the appropriate penalty.” (Citation omitted.) *Collier* at 27.

Accordingly, both the *Collier* and *Burton* courts found that the entire amendment applied to those cases. Both defendants in *Collier* and *Burton* were returned to the trial court and sentenced *for* committing misdemeanors, not *as if* they had committed misdemeanors. *Burton* at 262.

In its decision below, the 9th District Court of Appeals made no attempt to determine how the holdings in *Collier* and *Burton* would apply to the amendments contained in HB 86. Indeed, the court below did nothing more than baldly assert that R.C. 1.58(B) does not apply to offense level. But, the plain meaning of *Burton* and *Collier* is that a defendant must be sentenced for the misdemeanor after such an amendment. Any other reading results in a defendant receiving a misdemeanor sentence for a felony offense, a sentence not authorized by statute. Such a finding is nonsensical, irrational, and is not supported by *Collier* and *Burton*, nor by a plain reading of R.C. 1.58.

II. This Court has held that R.C. 1.58(B) applies not only to sentence length, but also to the collateral consequences of a conviction.

In *State v. Kaplowitz*, this Court held that, pursuant to R.C. 1.58(B), when the legislature lowers the penalty for an offense, a defendant is entitled to both the shorter sentence *and* the less

court's decision that Mr. Taylor was subject to the collateral consequences that stem from a felony conviction.

III. Most Ohio appellate courts agree that the level of an offense is a “penalty” subject to R.C. 1.58(B) and must be lowered for defendants like Mr. Taylor.

Only the Eighth District agrees with the court below that offense level is unaffected by R.C. 1.58(B). *State v. Steinfurth*, 8th Dist. No. 97549, 2012-Ohio-3257, 2012 Ohio App. LEXIS 2859; *State v. Saplak*, 8th Dist. No. 97825, 2012-Ohio-4281, 2012 Ohio App. LEXIS 3756 (both holding that the defendants should receive felony convictions and misdemeanor sentences). But, even the court below could not agree on the proper result. One judge dissented from the majority's reasoning, arguing that the defendant should receive the misdemeanor conviction, not just misdemeanor sentencing. *Taylor*, 9th Dist. No. 26279, 2012-Ohio-5403, 2012 Ohio App. LEXIS 4689, at ¶ 11 (Belfance, J., dissenting).

Conversely, most of Ohio's appellate courts have disagreed with the court below. The 1st, 2nd, 5th, 11th districts have all held that the changes enacted by HB 86 require misdemeanor offense levels for defendants like Mr. Taylor. *See, e.g., State v. Solomon*, 1st Dist. No. C-120044, 2012-Ohio-5755, 2012 Ohio App. LEXIS 4996; *State v. Arnold*, 2d Dist. No. 25044, 2012-Ohio-5786, 2012 Ohio App. LEXIS 4973; *State v. Gillespie*, 5th Dist. No. 2012-CA-6, 2012-Ohio-3485, 2012 Ohio App. LEXIS 3067; *State v. Cefalo*, 11th Dist. No. 2011-L-163, 2012-Ohio-5594, 2012 Ohio App. LEXIS 4881.

Additionally, in *Cefalo*, the 11th District Court of Appeals explicitly held that offense level is a part of the penalty for an offense and must be reduced by the application of R.C. 1.58(B). *Cefalo* at ¶ 19. The 5th District used the same logic. *David*, 5th Dist. No. 11-CA-110, 2012-Ohio-3984, at ¶ 14. Only one Ohio court has held that offense level is not part of “penalty.” In *Solomon*, the 1st District Court of appeals held that “the degree or level of the offense

generally directs the authorized penalty and it is included in the judgment that a court formally pronounces after finding the defendant guilty. But it is not the “penalty.” *Solomon* at ¶ 44. However, that court still held that R.C. 1.58(B) applied to offense level, regardless of whether offense level is a punishment or a penalty. *Id.* at ¶ 54. The court held that the whole amendment applied to the defendant in *Solomon*, which included the amended offense levels, even if the offense levels were not “penalties” by themselves. *Id.* at ¶ 49. So, even when that court expressed reservations regarding whether offense level is part of penalty, it still arrived at the same conclusion: defendants like Mr. Taylor are entitled to lowered offense level as a result of R.C. 1.58(B) and HB 86.

The court’s holding to the contrary disagrees with all but one of Ohio’s appellate courts and is an unreasonable and irrational application of R.C. 1.58(B) and HB 86. This Court should reverse the court below to settle the conflict in favor of the plain meaning of the revised code and the majority of Ohio’s appellate districts.

CONCLUSION

In a theft case, penalties are tethered to offense levels. When the General Assembly amends a statute to decrease the degree of an offense, the attached penalties decrease with it. This is especially true when an offense is changed from a felony to a misdemeanor, relieving a defendant of an array of collateral consequences. Yet, the court below separated sentence length from offense level, in contravention of Ohio's theft statute and in disagreement with the majority of Ohio's appellate districts. This Court should effectuate the plain and unambiguous meaning of R.C. 1.58(B) by restoring Mr. Taylor's misdemeanor conviction. The Office of the Ohio Public Defender, as amicus curiae, urges this Court to reverse the judgment of the 9th District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT LUCIOUS TAYLOR** was forwarded by regular U.S. Mail, postage prepaid to Richard S. Kasay, Summit County Prosecutor's Office, 53 University Avenue, Akron, OH 44308, and Neil P. Agarwal, 3766 Fishcreek Rd., #289, Stow, OH 44224, on this 6th day of May, 2013.



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